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No. 99-802

Supreme Court, U.S.
FILED
DEC 8 1999
CLERK

In The

Supreme Court of the United States

WESLEY LACUESTA, RONALD HENSINGER and JOHN DENKO,

Petitioners,

v.

ROSE ARCHULETA, as personal representative of the ESTATE OF MARVIN ARCHULETA,

Respondent.

On Petition For A Writ Of Certiorari To The New Mexico Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROTHSTEIN, DONATELLI, HUGHES, DAHLSTROM, CRON & SCHOENBURG, LLP
ROBERT R. ROTHSTEIN
Counsel of Record
JOHN L. SULLIVAN
Post Office Box 8180
500 Montezuma, Suite 101
Santa Fe, New Mexico 87504-8180
(505) 988-8004

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption to the petition, the parties to this case include the New Mexico State Police and the New Mexico Department of Public Safety.

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STATEMENT OF THE CASE

This petition seeks review of a New Mexico Court of Appeals decision that does not constitute a final judgment or decree for purposes of 28 U.S.C. § 1257(a), because that Court merely found that there were material factual issues that precluded summary judgment under the New Mexico Rules of Civil Procedure and remanded to the trial court for further proceedings. There has been no final state court determination as to the petitioners' entitlement to qualified immunity with respect to the respondent's claims under 42 U.S.C. § 1983, and therefore this Court lacks jurisdiction to review the qualified immunity issues addressed by the New Mexico Court of Appeals. Moreover, the determination that the petitioners are not entitled to summary judgment under the New Mexico Rules of Civil Procedure does not involve a federal law issue subject to review by this Court.

The petition also substantially misrepresents the record in this case and the substance of the decision the petitioners are asking this Court to review. As they have throughout this case, the petitioners ignore substantial evidence contradicting their account of the circumstances surrounding the shooting that gave rise to the respondent's claims and the obligation to view the record in the light most favorable to the party opposing summary judgment. As for the substance of the New Mexico Court of Appeals decision, the petitioners erroneously state that the Court found that resolution of the Fourth Amendment excessive force inquiry automatically determined the petitioners' entitlement to qualified immunity. In fact, the Court of Appeals adopted "the premise that the question of qualified immunity is not simply whether the

action violated the constitutional standard, but whether a competent officer could have reasonably believed that the action was lawful in light of clearly established constitutional principles." App. at 6. The Court found that factual disputes material to both the former *and* the latter determinations precluded summary judgment.

Therefore, the premise of the petition – that the New Mexico Court of Appeals found that resolution of the Fourth Amendment issue automatically determined the petitioners' entitlement to qualified immunity – lacks any basis in the record. Even if this Court were inclined to look at the question of whether reasonableness for qualified immunity purposes differs from reasonableness for Fourth Amendment purposes in an excess force case, this would not be the case to do so.

A. Facts

Petitioner Wesley LaCuesta ("LaCuesta") shot and killed Marvin Archuleta ("Archuleta") near Archuleta's home in the community of Tecolote in San Miguel County, New Mexico on March 3, 1994. At the time, LaCuesta was a law enforcement officer employed by the New Mexico State Police ("NMSP"), which is a department of the New Mexico Department of Public Safety ("DPS"). The shooting occurred during a confrontation between Archuleta, LaCuesta and petitioner Ronald Hensinger ("Hensinger"), also an officer employed by NMSP, in the course of the officers' response to a domestic disturbance at the Archuleta residence.

During the evening of March 3, 1994, LaCuesta and Hensinger responded to a dispatch call regarding a possible domestic disturbance at the Archuleta residence. LaCuesta drove to a neighboring residence, where he spoke with Archuleta's wife, Lorraine. Hensinger, in a separate vehicle, proceeded to the Archuleta residence and encountered Archuleta outside the residence. LaCuesta then joined Hensinger.

Archuleta began to walk and occasionally run away, and LaCuesta and Hensinger pursued him with their service weapons drawn. At some point during this pursuit, LaCuesta, a rookie, shot and killed Archuleta. Hensinger, a 20-year veteran, did not fire his weapon. Other than LaCuesta and Hensinger, no one saw the shooting.

The petition ignores evidence in the record, cited by the New Mexico Court of Appeals, indicating that (i) Archuleta was not armed with a knife, as the petitioners have represented to the Court; (ii) Archuleta was significantly farther away from LaCuesta and Hensinger than they have represented to the Court; and (iii) Archuleta had his back to Hensinger when he was shot and therefore could not have been lunging or making any other kind of threatening gesture toward Hensinger, as the petitioners have represented to the Court.[1]

As to Archuleta's distance from Hensinger when LaCuesta shot Archuleta, the Court of Appeals noted

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[1] In addition, the petitioners rely on an audio tape recording of the incident without noting that the respondent submitted expert testimony showing that portions of the tape had been erased and re-recorded, such that it was not an authentic recording of the events as they occurred.

evidence in the record that, in a tape recorded interview on the night of the shooting, Hensinger said several times he was standing 12 *yards* away from Archuleta when LaCuesta shot him, and he even drew a diagram indicating that he was standing 12 *yards* away from Archuleta and that LaCuesta was 25 to 27 *yards* from Archuleta. App. at 8; ROA at 1805, 1814. Hensinger later changed his story to say that he was 12 *feet* away from Archuleta and that LaCuesta was 28 *feet* away from Archuleta at the time the shot was fired. ROA at 1805-1806. In his deposition, Hensinger conceded that Archuleta would not have posed a sufficient danger from 12 yards away to justify using deadly force. ROA at 1804.

As the New Mexico Court of Appeals noted, App. at 8, the ballistics and wound track evidence contradict the officers' accounts as to where they were standing relative to Archuleta and the movements Archuleta supposedly was making. According to LaCuesta's and Hensinger's statements to investigators and deposition testimony, if Archuleta had been facing Hensinger, LaCuesta would have been looking at Archuleta's *right* side. ROA at 1508. However, the autopsy report shows that the bullet from Archuleta's gun entered Archuleta's upper *left* chest just below the clavicle and traveled *from left to right* at approximately a 25-30 degree angle and from front to back at a slight downward angle. ROA at 1921.

In his deposition, the pathologist from the New Mexico Office of the Medical Investigator who performed the autopsy testified that the ballistics and wound track evidence contradicted and was physically inconsistent with the officers' testimony as to Archuleta's position and actions when LaCuesta shot him. ROA at 1929-1942. An

affidavit by a ballistics expert who conducted his own investigation of the shooting stated that (i) "[I]t was not physically possible that Marvin Archuleta could have been facing towards Sergeant Hensinger at the time of the shooting;" (ii) "[I]t is highly probable that Mr. Archuleta was turned away from and had his back to Sgt. Hensinger which would have placed his left side towards Officer LaCuesta;" and (iii) "Archuleta could not possibly have been engaged in the actions directed towards Sergeant Hensinger such as are described by Sergeant Hensinger and Officer LaCuesta in their various reports and testimony." ROA at 1904-1906.

The petitioners offered no expert testimony to reconcile the physical evidence with their account of what occurred.

B. Judicial Proceedings

1. The Complaint

The Amended Complaint herein was filed by Archuleta's widow, Lorraine Archuleta, as personal representative of his estate.[2] The Amended Complaint alleged claims under the New Mexico Tort Claims Act ("NMTCA"), NMSA 1978, §§ 41-4-1 *et seq.* (1976), against LaCuesta, Hensinger, Denko, NMSP and DPS and claims under 42 U.S.C. § 1983 against LaCuesta, Hensinger and Denko. The respondent's § 1983 claims alleged that

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[2] Lorraine Archuleta was killed in an automobile accident on January 27, 1996, and Archuleta's mother, Rose Archuleta, was substituted as personal representative and Plaintiff. The heirs of Archuleta's estate are his four minor children.

LaCuesta, Hensinger and Denko violated Archuleta's clearly established rights under the Fourth and Fourteenth Amendments to the United States Constitution to be free from unreasonable seizures and to substantive due process of law.

2. Petitioners' Motions For Summary Judgment

LaCuesta, Hensinger, Denko, NMSP and DPS filed motions for summary judgment regarding all of the respondent's causes of action. With respect to the respondent's § 1983 claims, the petitioners argued that the undisputed facts showed that LaCuesta believed that Archuleta posed an immediate and serious threat to Hensinger's safety at the time of the shooting and that the use of deadly force was reasonable. Hensinger and Denko presented separate arguments as to why they were entitled to summary judgment, even if LaCuesta's decision to shoot Archuleta was not reasonable. The District Court never ruled on these separate arguments made by Hensinger and Denko.

The District Court granted summary judgment for the petitioners with respect to the respondent's federal claims under § 1983, but denied summary judgment with respect to the respondent's NMTCA claims.

3. Trial and Verdict on Respondent's NMTCA Claims.

After a jury trial on the respondent's NMTCA claims, the jury returned a verdict finding that the petitioners caused a battery to be committed on Archuleta. The jury

apportioned the liability as follows: LaCuesta (10%), Hensinger (38%), Denko (10%), Archuleta (42%). With respect to damages, the jury found for the respondent in the amount of $1,758,584.20. By stipulation of the parties, as well as under NMSA 1978, § 41-4-4(D), NMSP and DPS are vicariously liable for any judgment entered against the petitioners on the NMTCA claims.

4. Respondent's Motion For Relief From Order Granting Summary Judgment On § 1983 Claims And Interlocutory Appeal.

On December 9, 1997, the respondent filed a Motion For Relief From Order pursuant to Rule 1-060(B) NMRA, asking the District Court to grant relief from the portion of the May 2, 1997 Order granting summary judgment in favor of the petitioners with respect to the respondent's § 1983 claims. On March 18, 1998, the District Court entered an order denying the motion but authorizing an immediate interlocutory appeal. App. at 17-18.[3]

The New Mexico Court of Appeals granted the respondent's application for interlocutory appeal, and on

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[3] In its opinion, the New Mexico Court of Appeals stated erroneously that the District Court denied the motion for reconsideration because no final order had been entered on the respondent's NMTCA claims. App. at 4. In fact, the District Court denied the motion on the merits of the respondent's § 1983 claims. The appeal was interlocutory in nature because no final order had been entered on the respondent's NMTCA claims, due to remaining issues regarding the respondent's challenge to the constitutionality of damages caps in the NMTCA. *See* NMSA 1978, § 41-4-19 (imposing limits on liability in tort actions against governmental entities).

July 2, 1999, the Court of Appeals reversed. On August 12, 1999, the New Mexico Supreme Court denied the petitioners' request for a writ of certiorari to review the decision of the Court of Appeals. App. at 19.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE NEW MEXICO COURT OF APPEALS BECAUSE THAT DECISION IS NOT A FINAL JUDGMENT OR DECREE WITHIN THE MEANING OF 28 U.S.C. § 1257(a).

According to the petitioners' statement of the grounds on which this Court's jurisdiction is invoked:

> This Court has certiorari jurisdiction over the challenged decision of the New Mexico Court of Appeals pursuant to 28 U.S.C. § 1257(a) because an "immunity is specially set up or claimed under the . . . statutes of . . . the United States." Further, the New Mexico Court of Appeals decision denying the petitioners' motion for summary judgment based on 42 U.S.C. § 1983 qualified immunity is an appealable interlocutory order under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

Petition at 1-2.

However, under 28 U.S.C. § 1257(a):

> *Final judgments or decrees* rendered by the highest court of a State in which a decision could be had, *may be reviewed* by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn

> in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (*emphasis added*)

"This provision establishes a firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, ___ U.S. ___, 118 S.Ct. 481, 485 (1997). As the *Jefferson* Court noted, to be reviewable in this Court, a state court judgment must be final in two senses: (1) it must be subject to no further review or correction in any other state tribunal; and (2) it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *Id.*, 118 S.Ct. at 485-86 (citing *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)). *See also* 16B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters 2d* § 4007 at 135 ("If a state's highest court decides a federal question but remands for further proceedings in lower state courts, the exhaustion and final judgment requirements together mean that the case must again be presented to the highest court before the Supreme Court can assert jurisdiction.").

The finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio State WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). *See also* Wright, Miller & Cooper, *supra*, § 4007 at 131 (§ 1257(a) reflects policy that

"[i]nterference with state judicial systems is reduced to a minimum by affording every opportunity for correction of error by the state courts themselves."). "If review will be available in a higher state court at a later time, all of the purposes of requiring exhaustion of state review opportunities suggest that the present Supreme Court review be denied." Wright, Miller & Cooper, *supra*, § 4007 at 142.

Here, the New Mexico Court of Appeals decision is not final as an effective determination of the litigation, but rather is interlocutory in nature. No final decision has been made as to whether the petitioners are entitled to qualified immunity. Instead, the New Mexico Court of Appeals decision merely found that there were factual issues that precluded summary judgment on the current record, remanded to the trial court for further proceedings, and even held out the possibility that petitioners Hensinger and Denko could continue to seek summary judgment in the trial court on grounds independent of the reasonableness of LaCuesta's use of deadly force. App. at 11. While the verdict on the respondent's state law claims may preclude relitigation of many of the factual issues pertaining to the respondent's Fourth Amendment claim and the petitioners' qualified immunity defense, those issues remain to be decided by the state trial court and may be appealed once again through the state system.

The petitioners' reliance on *Mitchell* is misplaced. First, *Mitchell* pertains to appeals within the federal system under 28 U.S.C. § 1291, not this Court's certiorari review of state court decisions under § 1257(a). Moreover, as this Court held in *Johnson v. Jones*, 515 U.S. 304 (1995), "a defendant, entitled to invoke a qualified immunity

defense [in a § 1983 case], may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.*, 515 U.S. at 319-20.

In *Jones*, the plaintiff brought a Fourth Amendment excessive force case under § 1983 against several police officers, and certain of the defendants moved for summary judgment on the grounds that there was no evidence that they had beaten the plaintiff or had been present while others did so. The district court found that there were genuine issues of fact precluding summary judgment, pointing to the plaintiff's deposition testimony, in which he swore that the officers had used excessive force, and the officers' depositions, in which they admitted being present when the plaintiff was arrested. In upholding the circuit court's dismissal of the defendants' appeal from the denial of summary judgment, this Court drew a distinction between determinations as to pre-existing clearly established law, a purely legal issue appealable under *Mitchell*, and determinations as to whether there is a genuine issue of fact for trial, which cannot be appealed under the *Mitchell* doctrine.

In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court reaffirmed that "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision' " under the *Mitchell* doctrine. *Id.*, 516 U.S. at 313. The *Behrens* Court held that the Court of Appeals had jurisdiction there under 28 U.S.C. § 1291, because the appeal concerned the defendants' claim that qualified immunity

reasonableness standard was met, even conceding the correctness of the District Court's determination that there was sufficient evidence, for purposes of summary judgment, that certain conduct had occurred.

Here, the New Mexico Court of Appeals decision involves a determination that there is a genuine issue of fact for trial, and not a purely legal question as to whether a given set of facts make out a violation of pre-existing clearly established law. Unlike the situation in *Behrens*, the petitioners' presentation of the qualified immunity issues here requires the Court to involve itself in the evidentiary sufficiency issues which the New Mexico Court of Appeals saw as precluding summary judgment. Therefore, the *Mitchell* doctrine does not provide a basis for this Court to review the New Mexico Court of Appeals decision.

II. THE NEW MEXICO COURT OF APPEALS DECISION DOES NOT INVOLVE A FEDERAL ISSUE BECAUSE THE PETITIONERS DO NOT HAVE A FEDERAL LAW RIGHT TO SUMMARY JUDGMENT IN THE STATE COURT.

In *Johnson v. Fankell*, ___ U.S. ___, 117 S.Ct. 1800 (1997), this Court held that a defendant in a state court action under § 1983 does not have a federal law right to an interlocutory appeal from a trial court decision refusing to grant summary judgment on the grounds of qualified immunity. The *Johnson* case was filed in an Idaho state court, and the Idaho Supreme Court had refused to hear an interlocutory appeal from the trial court's denial of summary judgment, because the Idaho Appellate Rules

did not allow for an appeal from an order denying summary judgment. On certiorari to this Court, the Court rejected the argument that the defendants had a federal law right to an interlocutory appeal.

It follows necessarily that the petitioners here do not have a federal right to summary judgment under the New Mexico Rules of Civil Procedure. As with the right to appeal under the Idaho Appellate Rules, the petitioners' right to summary judgment under Rule 1-056 of the New Mexico Rules of Civil Procedure is a state law matter. Therefore, the New Mexico Court of Appeals determination that the petitioners were not entitled to summary judgment on the issue of qualified immunity does not implicate a federal law right and is not reviewable in this Court.

III. THE NEW MEXICO COURT OF APPEALS DECISION ACKNOWLEDGED THAT QUALIFIED IMMUNITY MAY EXIST IN AN EXCESSIVE USE OF FORCE CASE AND THEREFORE ITS DECISION DOES NOT CONFLICT WITH DECISIONS RECOGNIZING THE POSSIBILITY OF QUALIFIED IMMUNITY IN THIS CONTEXT.

In their effort to demonstrate that the New Mexico Court of Appeals decision conflicts with decisions of other courts, the petitioners mischaracterize the decision as having "made the Fourth Amendment excessive force inquiry *automatically* determinative of the petitioners' entitlement to qualified immunity." Petition at 11 (*emphasis in original*). In fact, the New Mexico Court of Appeals proceeded from "the premise that the question of qualified immunity is not simply whether the action

violated the constitutional standard, but whether a competent officer could have reasonably believed that the action was lawful in light of clearly established constitutional principles." App. at 6. In applying this standard to LaCuesta, the Court said, "The reasonableness of Officer LaCuesta's shooting Archuleta depends on whether he had probable cause to believe Archuleta posed a significant threat of death or serious physical injury." App. at 7. The Court concluded that, "[e]ven assuming that Archuleta had a knife and was taking flight from the scene of a domestic disturbance call, if the officers were a sufficient distance from him, or, if he was not making any threatening gesture toward the officers when he was shot, a reasonable officer in Officer LaCuesta's position would not have probable cause to believe that Archuleta posed a significant threat of death or serous injury." App. at 7. *See also* App. at 9 ("If Archuleta did not make any threatening motion toward Officer Hensinger or if Officer Hensinger was twelve yards away from Archuleta, a jury could reasonably conclude that Officer LaCuesta did not have probable cause to believe Officer Hensinger was in immediate danger *and* that no reasonable officer could have believed that shooting Archuleta under this factual scenario was lawful.") (*emphasis added*).

Thus, the New Mexico Court of Appeals applied essentially the same standard that was applied in the decisions with which it purportedly conflicts. *See Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) ("If a reasonable officer could have found probable cause to believe that Slattery presented a serous threat of personal harm at the time that Rizzo pulled the trigger, then as a matter of law, the appellant is entitled to qualified immunity."); *District*

of Columbia v. Evans, 644 A.2d 1008, 1015 (D.C. Ct. App. 1994) (citing *Slattery*).

IV. THE FACTUAL DISPUTES IN THE RECORD ARE MATERIAL TO THE QUALIFIED IMMUNITY INQUIRY, REGARDLESS OF WHETHER A DIFFERENT QUALIFIED IMMUNITY STANDARD IS APPLIED.

Notably absent from the petition is any discussion of how the "proper" qualified immunity standard differs from the one applied by the New Mexico Court of Appeals and why the factual disputes that the New Mexico Court of Appeals saw as precluding summary judgment would not preclude summary judgment under some other qualified immunity standard. Indeed, rather than acknowledge these factual disputes, the petitioners offer a distorted view of the record which, if it in fact existed, perhaps would not support a Fourth Amendment claim and thus would not require an examination of qualified immunity. The primary thrust of the petitioners' defense in this case has focused on the absence of a Fourth Amendment violation, and they have never articulated a theory under which both a Fourth Amendment violation and an entitlement to qualified immunity could exist.

Even putting aside the evidence indicating that Archuleta did not have a knife, as the Court of Appeals did, the conflicts in the evidence as to Archuleta's distance from the officers and Archuleta's movements at the time that LaCuesta shot him are material to the question of whether the officers are entitled to qualified immunity. The evidence contradicting the petitioners' account of

what happened shows that Archuleta did not pose a significant threat of death or serious physical injury *and that LaCuesta could not reasonably have believed that Archuleta posed a threat of death or serious physical injury.*

Therefore, the record supports the New Mexico Court of Appeals decision to reverse the trial court's summary judgment order, regardless of the purported difference between the "proper" qualified immunity standard and the qualified immunity standard applied by the New Mexico Court of Appeals. Thus, this is not an appropriate case in which to address the appropriate qualified immunity standard. If the Court were inclined to address the purported differences in the Fourth Amendment and qualified immunity standards, the Court would be better advised to await a case where both a Fourth Amendment violation and an entitlement to qualified immunity exists in the record.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

ROTHSTEIN, DONATELLI, HUGHES,
DAHLSTROM, CRON
& SCHOENBURG, LLP
ROBERT R. ROTHSTEIN
Counsel of Record
JOHN L. SULLIVAN
Post Office Box 8180
500 Montezuma, Suite 101
Santa Fe, New Mexico 87504-8180
(505) 988-8004

Attorneys for Respondent

December 8, 1999